

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MCILWAIN, LLC,
Plaintiff,
v.
STEVE W. BERMAN, et al.,
Defendants.

Case No. 18-cv-03127 CW
ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT
(Dkt. No. 123)

Defendant Hagens Berman Sobol Shapiro LLP (Hagens Berman) moves for summary judgment with respect to all three claims that Plaintiff McIlwain, LLC (McIlwain) has asserted against it. McIlwain opposes the motion. For the reasons set forth below, the Court GRANTS the motion in its entirety.

BACKGROUND

I. Procedural history

This action arises out of the breach of an alleged contract to split attorneys' fees between three law firms: McIlwain, non-party Lanier Law Firm, and Defendant Hagens Berman. See Compl. ¶ 9 at 5.¹ The attorneys' fees to be apportioned were those that the Court would award to these three law firms after approving the settlement of three similar putative class actions filed against

¹ The paragraph numbers in the complaint repeat several times; accordingly, paragraph numbers, as well as page numbers, are cited in this order.

1 Electronic Arts (EA), in which the plaintiffs sought damages
2 arising out of EA's use of student-athletes' images and likenesses
3 in video games (right-of-publicity actions).

4 One of these actions was filed in 2009 by McKenna McIlwain LLP
5 on behalf of plaintiff Ryan Hart in the Superior Court of New
6 Jersey; it was subsequently removed to the District of New Jersey
7 and captioned Hart v. Electronic Arts Inc., Case No. 09-cv-05990
8 (Hart). Ryan Hart was initially represented by McKenna McIlwain
9 LLP; that firm was replaced by Timothy McIlwain² in July 2013. See
10 Hart, Docket Nos. 60, 61. Timothy McIlwain withdrew as counsel for
11 Ryan Hart in November 2013. No class was ever certified in Hart.
12 Timothy McIlwain was never appointed as interim class counsel, and
13 Ryan Hart was never appointed as interim class representative.

14 The remaining two actions were filed by Hagens Berman: one in
15 the Northern District of California, captioned Keller v. Electronic
16 Arts, Inc., Case No. 09-cv-1967 (Keller), and the other in the
17 District of New Jersey, captioned Alston v. Electronic Arts, Case
18 No. 13-cv-5157 (Alston). Collegiate Licensing Company (CLC) was
19 the second defendant in Keller.

20 The plaintiffs in Keller, Alston, and Hart were referred to as
21 the "right-of-publicity plaintiffs" because they asserted claims on
22 behalf of putative classes under the right-of-publicity laws of
23 California and New Jersey.

24 A fourth action, captioned O'Bannon v. NCAA, Case No. 09-cv-
25 3329 (O'Bannon) was filed by Hausfeld LLP. It asserted claims on

26 ² Timothy McIlwain is a "solo practitioner" operating as
27 "McIlwain LLC a/k/a Timothy J. McIlwain, Attorney at Law." See
28 Complaint ¶ 1 at 1. Timothy McIlwain is the principal of McIlwain.
Timothy McIlwain Decl. ¶ 1, Docket No. 134.

1 behalf of putative classes against the National Collegiate Athletic
2 Association (NCAA), EA, and CLC under the Sherman Act, 15 U.S.C. §
3 1. The plaintiffs in this action were referred to as the
4 "antitrust plaintiffs."

5 On January 15, 2010, this Court consolidated O'Bannon and
6 Keller along with several other pending related actions into an
7 action captioned In re NCAA Student-Athlete Name & Likeness
8 Licensing Litigation, Case No. 09-cv-1967. O'Bannon, Docket No.
9 139. On that date, the Court appointed Hausfeld LLP and Hagens
10 Berman as co-lead counsel in the consolidated case, with Hausfeld
11 LLP taking primary responsibility for the O'Bannon plaintiffs'
12 antitrust claims and Hagens Berman taking primary responsibility
13 for the Keller plaintiffs' right-of-publicity claims.

14 As described in more detail below, the right-of-publicity
15 plaintiffs and antitrust plaintiffs in the actions described above
16 reached a global settlement with EA, and their counsel moved for,
17 and were awarded, attorneys' fees and costs when the Court approved
18 the settlement.

19 In the present action, McIlwain asserts three claims against
20 Hagens Berman, the remaining Defendant³: (1) breach of contract;
21 (2) breach of the covenant of good faith and fair dealing; and (3)
22 interference with prospective economic advantage. All of these
23 claims arise out of Hagens Berman's failure to split with McIlwain,
24 pursuant to an alleged fee-splitting agreement, the attorneys' fees
25

26 ³ The Court dismissed McIlwain's claims against individual
27 defendants Steve Berman, Robert B. Carey, and Leonard W. Aragon,
28 all of whom are partners at Hagens Berman. See Order of November
5, 2018, Docket No. 66; Order of November 21, 2018, Docket No. 68.

1 that the Court awarded it when the Court approved the settlement of
2 the right-of-publicity claims against EA.

3 McIlwain moved for partial summary judgment on its claim for
4 breach of contract on May 2, 2019. Docket No. 86. The Court
5 denied the motion on October 22, 2019. Docket No. 121.

6 The Court held a further case management conference on
7 November 19, 2019, during which the Court set, at Hagens Berman's
8 request, a briefing schedule for a motion for summary judgment by
9 Hagens Berman. See Minutes and Case Management Order, Docket No.
10 127. McIlwain did not oppose this request at the case management
11 conference.⁴

12 II. Relevant undisputed facts⁵

13 Timothy McIlwain of "Timothy McIlwain, Attorney at Law, LLC"
14 became counsel for Ryan Hart in Hart on July 10, 2013. Hart,
15 Docket Nos. 60, 61. Timothy McIlwain is the principal of McIlwain
16 LLC. Timothy McIlwain Decl. ¶ 1, Docket No. 134. McIlwain is
17 located in New Jersey, Compl. ¶ 1 at 1, and Timothy McIlwain is
18 licensed to practice in New Jersey, see Docket No. 73.

19 McIlwain produced a document in this litigation titled "Class
20 Representative/Attorney Representation Agreement," which appears to
21 set forth the terms of the attorney-client relationship between the

22 ⁴ McIlwain requests that the Court deny Hagens Berman's present
23 motion for summary judgment as untimely. See Opp'n at 10-11, Docket
24 No. 133. This request is not well-taken. Hagens Berman filed the
25 present motion on November 21, 2019, which was the deadline set by
the Court during the November 19, 2019, case management conference.
See Minutes and Case Management Order, Docket No. 127. Accordingly,
the present motion is timely.

26 ⁵ McIlwain's opposition contains a number of assertions that
27 are not supported by any admissible evidence or other materials
that the Court can consider in deciding the present motion. These
28 unsupported assertions are therefore omitted from this order.

1 "Law Offices Timothy McIlwain [sic], Attorney at Law, LLC" and Ryan
2 Hart. Timothy McIlwain Decl., Ex. 20, Docket No. 134-1 at 108-09.
3 This document is not signed by Ryan Hart. See id., Docket No. 134-
4 1 at 109. The document states, in relevant part:

5 CLIENT understands that the ATTORNEYS reserve
6 the right to determine all litigation tactics
7 on behalf of CLIENT, including adding other
8 class representatives to the matter and
9 bringing in additional law firms to work with
the ATTORNEYS on the case, who will be
compensated either in the same manner as
ATTORNEYS or in another manner to be
determined by ATTORNEYS.

10 Id. ¶ 4, Docket No. 134-1 at 108. Ryan Hart testified at his
11 deposition, which took place in August 2019, that he did not recall
12 previously receiving or signing this document. Ryan Hart Dep. Tr.
13 at 17, Docket No. 124-1 at 129. Ryan Hart also testified, however,
14 that "back then [he] w[as] okay with" the provision of this
15 unsigned agreement that provides that the "attorneys reserve the
16 right to determine all litigation tactics for the client, including
17 adding other class representatives to the matter and bringing in
18 additional law firms . . . who will be compensated either in the
19 same manner as attorney or in another manner to be determined by
20 attorneys." Id. at 38-39, 70-71, Docket No. 134-1 at 4-7.

21 In a letter dated September 4, 2013, Timothy McIlwain notified
22 Ryan Hart of an upcoming mediation with EA, which was scheduled for
23 September 10, 2013. Timothy McIlwain Decl., Ex. 21, Docket No.
24 134-1 at 112-14. In the same letter, Timothy McIlwain requested
25 Ryan Hart's written consent to add the Lanier Law Firm as co-
26 counsel in Hart and to permit Timothy McIlwain to share with the
27 Lanier Law Firm any attorneys' fees he was awarded in Hart.
28 Specifically, the letter states:

While you have agreed to the Lanier Law Firm joining us, the rules of professional conduct require that legal services agreements be agreed to in writing. As I have stated, the Lanier Law Firm joining your case will not require you to pay more in legal fees I have agreed to share my attorney fee with the Lanier Law Firm on a sliding scale that entitles them to 25% of my attorney fee if the case resolves at mediation and will increase to as high as 50% of the total attorney fees approved by the court in connection with your case after mediation. Enclosed please find an email exchange between the Lanier Law Firm and me from July 31, 2013 until August 1, 2013, which codifies our agreement on the shared attorney fee. Again, I know you have agreed to this, but if you could review this letter and fax/email back your signature indicated below that you agree to the my [sic] shared attorney fee with the Lanier Law Firm that would be helpful prior to mediation.

Id. This letter does not request Ryan Hart's consent to add as co-counsel, or to share attorneys' fees with, any other law firm. The letter was apparently signed by Ryan Hart on September 4, 2013.

Id. Various members of the Lanier Law Firm, including Mark Lanier and Eugene Egendorf, were admitted pro hac vice as counsel for Ryan Hart in Hart on August 27, 2013. Hart, Docket No. 69.

McIlwain has not submitted a similar letter showing that Ryan Hart consented to adding Hagens Berman as co-counsel or consenting to McIlwain sharing attorneys' fees with Hagens Berman.

On September 10, 2013, the plaintiffs in the right-of-publicity actions and O'Bannon participated in a mediation with EA before mediator Randall Wulff. The parties could not reach a settlement on September 10 but they continued to negotiate. Carey Decl. ¶ 16, Docket No. 111.

On September 24, 2013, the mediator, Randall Wulff, emailed counsel who participated in the mediation, stating that "[a]ll parties have accepted the mediator's proposal, which includes the

1 agreements among plaintiffs' counsel regarding allocation that were
2 finalized today. I have asked Jamie to reach out immediately to
3 plaintiffs' counsel and start the documentation process." Aragon
4 Decl., Ex. W, Docket No. 124-1 at 246.

5 Also on September 24, 2013, Eugene Egendorf of the Lanier Law
6 Firm wrote an email to Steve Berman of Hagens Berman, and copied
7 Robert Carey of Hagens Berman and Timothy McIlwain; this email
8 states:

9 I am writing to confirm what I understand our
10 agreement to be regarding the current proposal
11 from Randy Wulfte [sic] to settle the EA
litigation (Hart, Keller, and O'Bannon). Please
confirm our agreement and advise of any changes.

- 12 1. We agree to work together in the submission of
13 applications for fees and expenses;
- 14 2. We agree to support each other concerning the
substance and merits of our fee submissions;
- 15 3. We agree to support each other and collectively,
16 as appropriate, contest any applications for fees
and expenses from other firms;
- 17 4. For any fee award or agreement to our firms
18 (Hagens Berman, The Lanier Law Firm, and Tim
19 McIlwain), we agree to consider those as a joint
award which will be pooled together for our
collective group;
- 20 5. From that joint award to our collective group,
21 irrespective of the methodology, substance and
22 distribution ordered by the Court, we agree that
60% of such fees will be paid to Hagens Berman,
and the remaining 40% to Lanier and McIlwain;
- 23 6. Each of the firms can submit a request for
24 recovery of their reasonable expenses, and we
will support each other in that regard;
- 25 7. Lanier and McIlwain will be added as counsel to
26 the Keller case against the NCAA; the above
27 agreement concerning the distribution of fees on
a 60/40 basis will NOT apply to that
28 relationship, which will instead be governed by
either a future separate agreement or by Court
Order.

1 Aragon Decl., Ex. H, Docket No. 124-1 at 121 (fee-splitting
2 agreement). Hagens Berman's Rule 30(b)(6)'s designee, Robert
3 Carey, testified that the "60/40 percentage" referred to in this
4 email chain was discussed and agreed to on September 10, 2013, but
5 the parties "just waited two weeks to confirm it." Hagens Berman
6 Rule 30(b)(6) Dep. Tr. at 24, Aragon Decl., Ex. V, Docket No. 124-1
7 at 244.

8 On September 26, 2013, counsel for the right-of-publicity
9 plaintiffs and the O'Bannon antitrust plaintiffs signed a term
10 sheet providing, among other things, that EA would pay \$40 million
11 to settle the claims asserted, or that could have been asserted,
12 against it and CLC.⁶ Term Sheet at 1, Carey Decl., Ex. A, Docket
13 No. 125-1 at 2. Timothy McIlwain signed this term sheet as
14 "Plaintiffs' Counsel in Hart"; this document does not mention
15 McIlwain LLC. Id. at 5, Docket No. 125-1 at 6. In exchange, "the
16 parties" agreed, in relevant part, to "cooperate in the preparation
17 and presentation to the Court of a long-form agreement for approval
18 by the Court." Id. at 2, Docket No. 125-1 at 3. The term sheet
19 expressly stated that the agreement would be "subject to Court
20 approval." Id.

21 Ryan Hart first learned about the settlement through the
22 media, not Timothy McIlwain. Hart Dep. Tr. at 25, Aragon Decl.,
23 Ex. J, Docket No. 124-1 at 131. Ryan Hart testified at his
24 deposition that he never gave Timothy McIlwain or the Lanier Law
25 Firm permission to enter into a settlement with respect to Hart.
26 Id. at 26, Docket No. 124-1 at 132.

27 ⁶ CLC was not a party to the term sheet but was one of the
28 settlement's released parties.

1 Ryan Hart rehired Keith McKenna, who had initially represented
2 him in Hart, after he learned that Timothy McIlwain signed the term
3 sheet without his consent. Id. at 20, Docket No. 124-1 at 130. On
4 October 3, 2013, Ryan Hart, through his new counsel, sent a letter
5 to Timothy McIlwain requesting that he file a notice of
6 substitution indicating that Ryan Hart's new counsel was Keith
7 McKenna of the McKenna Law Firm, LLC. Timothy McIlwain Decl., Ex.
8 12, Docket No. 134-1 at 40. Keith McKenna filed a notice of
9 appearance as counsel for Ryan Hart on October 10, 2013. Hart,
10 Docket No. 77. Ryan Hart testified that he did not authorize
11 Timothy McIlwain to work on Hart after he terminated him as his
12 counsel. Hart Dep. Tr. at 29, Aragon Decl., Ex. J, Docket No. 124-
13 1 at 133.

14 An email dated October 10, 2013, shows that Robert Carey of
15 Hagens Berman wrote to members of the Lanier Law Firm regarding the
16 "dispute" with Ryan Hart, stating that, based on the advice of an
17 "ethics expert," Hagens Berman "cannot share information relating
18 to the settlement (at least insofar [sic] as it relates to Hart),"
19 and that "ER 1.9 may preclude you from participating further with
20 any client, unless the Hart/McIlwain fee agreement provides for
21 multiple representation." Aragon Decl., Ex. I, Docket No. 124-1 at
22 123.

23 On October 16, 2013, members of the Lanier Law Firm withdrew
24 as counsel for Ryan Hart in Hart. Hart, Docket No. 79.

25 On November 7, 2013, Timothy McIlwain and Ryan Hart's new
26 counsel, Keith McKenna and Arthur Owens, entered into a
27 "stipulation and agreement between counsel" pursuant to which
28 Timothy McIlwain, in relevant part, consented to "[m]ove forward

1 with the settlement" and "withdraw [his] appearance" in Hart.
2 Timothy McIlwain Decl., Ex. 14, Docket No. 134-1 at 65.
3 Additionally, this agreement states that "McIlwain does not object
4 to Hagens Berman or Lum Law firm [sic] and/or McKenna being
5 settlement counsel"; that "McIlwain is willing to assist in
6 obtaining affidavits for additional class representatives as
7 requested"; that "McIlwain retains the right to comment, but not
8 control the settlement agreement and motion for approval"; that
9 "McIlwain, McKenna and Lum law firm retain the right to file their
10 fee application and retain the right to respond to objections";
11 that the parties will be subject to "[c]onfidentiality except as
12 may be required between the parties to support the fee application
13 or by law and will undertake the efforts to file the agreement
14 under seal"; and that "McIlwain agrees to take no action in any of
15 the four (4) cases listed in the term sheet until disposition of
16 the settlement including appeal except as provided above and except
17 to the extent that the final settlement agreement is materially
18 different from the term sheet." Id. This document was signed by
19 Timothy McIlwain but contains references to a McIlwain "law firm."
20 See id. at 2, Docket No. 134-1 at 66.

21 On November 11, 2013, Timothy McIlwain withdrew as counsel for
22 Ryan Hart in Hart. Hart, Docket No. 98.

23 Counsel for the right-of-publicity plaintiffs (not including
24 McIlwain) and the O'Bannon antitrust plaintiffs continued to
25 negotiate the settlement with EA; these negotiations lasted months.
26 Carey Decl. ¶ 36, Docket No. 125. In the process, they modified
27 certain terms of the proposed settlement, particularly with respect
28

1 to how to allocate the settlement fund among the various classes of
2 plaintiffs. Id. ¶¶ 36, 47.

3 The right-of-publicity plaintiffs, the O'Bannon antitrust
4 plaintiffs, and EA ultimately finalized the settlement, which they
5 filed in July 2014. Aragon Decl., Ex. U, Docket No. 124-1.
6 Counsel for the right-of-publicity plaintiffs and the O'Bannon
7 antitrust plaintiffs moved for awards of attorneys' fees and costs.
8 Timothy McIlwain also moved for an award of fees and costs on the
9 ground that he had been counsel for Ryan Hart in Hart.

10 On August 18, 2015, this Court entered an order resolving the
11 motions for fees and costs, which was later corrected on December
12 15, 2015. In that order, the Court awarded, in relevant part,
13 \$696,700 in fees from the EA settlement to Timothy McIlwain and the
14 Lanier Law Firm, collectively, as former counsel in Hart, based on
15 their lodestar; and \$5,721,000 in fees from the EA settlement to
16 Hagens Berman, as counsel for the Keller right-of-publicity
17 plaintiffs, based on its lodestar. Keller, Order at 2-3, Docket
18 No. 1285.

19 On August 19, 2015, this Court granted final approval to the
20 settlement between the right-of-publicity and antitrust plaintiffs
21 and EA. See Keller, Docket No. 1243.

22 Hagens Berman admits that it did not split with McIlwain the
23 \$5,721,000 in fees that the Court awarded to it from the EA
24 settlement. Answer ¶ 20, Docket No. 69.

25 LEGAL STANDARD

26 Summary judgment is properly granted when no genuine and
27 disputed issues of material fact remain, and when, viewing the
28 evidence most favorably to the non-moving party, the movant is

1 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
2 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
3 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
4 1987).

5 The moving party bears the burden of showing that there is no
6 material factual dispute. Therefore, the court must regard as true
7 the opposing party's evidence, if supported by affidavits or other
8 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
9 F.2d at 1289. The court must draw all reasonable inferences in
10 favor of the party against whom summary judgment is sought.
11 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
12 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
13 1551, 1558 (9th Cir. 1991).

14 Material facts which would preclude entry of summary judgment
15 are those which, under applicable substantive law, may affect the
16 outcome of the case. The substantive law will identify which facts
17 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
18 (1986).

19 Where the moving party does not bear the burden of proof on an
20 issue at trial, the moving party may discharge its burden of
21 production by either of two methods:

22 The moving party may produce evidence negating an
23 essential element of the nonmoving party's case,
24 or, after suitable discovery, the moving party
25 may show that the nonmoving party does not have
enough evidence of an essential element of its
claim or defense to carry its ultimate burden of
persuasion at trial.

26 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
27 1099, 1106 (9th Cir. 2000).
28

1 If the moving party discharges its burden by showing an
2 absence of evidence to support an essential element of a claim or
3 defense, it is not required to produce evidence showing the absence
4 of a material fact on such issues, or to support its motion with
5 evidence negating the non-moving party's claim. Id.; see also
6 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
7 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
8 moving party shows an absence of evidence to support the non-moving
9 party's case, the burden then shifts to the non-moving party to
10 produce "specific evidence, through affidavits or admissible
11 discovery material, to show that the dispute exists." Bhan, 929
12 F.2d at 1409.

13 If the moving party discharges its burden by negating an
14 essential element of the non-moving party's claim or defense, it
15 must produce affirmative evidence of such negation. Nissan, 210
16 F.3d at 1105. If the moving party produces such evidence, the
17 burden then shifts to the non-moving party to produce specific
18 evidence to show that a dispute of material fact exists. Id.

19 If the moving party does not meet its initial burden of
20 production by either method, the non-moving party is under no
21 obligation to offer any evidence in support of its opposition. Id.
22 This is true even though the non-moving party bears the ultimate
23 burden of persuasion at trial. Id. at 1107.

24 ANALYSIS

25 Hagens Berman moves for summary judgment on all three claims
26 in the complaint, which the Court addresses below, in turn.

27 //

I. Breach of Contract

The first claim in the complaint is for breach of contract. Compl. ¶¶ 1-21 at 3-8. This claim is premised on allegations that Hagens Berman breached the fee-splitting agreement by, among other things, failing to split with McIlwain the fees it was awarded after the Court approved the settlement with EA. Id.

Under California law⁷, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011).

Hagens Berman argues that it is entitled to judgment as a matter of law as to McIlwain's claim for breach of contract on the grounds that: the fee-splitting agreement is unenforceable because (1) it violates New Jersey Rule of Professional Conduct (RPC) 1.5(e), (2) a condition precedent to the contract never occurred (namely, the consummation of the September 26, 2013, term sheet), and (3) Hagens Berman timely rescinded the agreement because of a unilateral mistake (specifically, Hagens Berman's mistaken belief that McIlwain had agreed to the fee-splitting contract and term sheet with the consent of Ryan Hart). Hagens Berman further argues that, even if the fee-splitting agreement is enforceable, McIlwain's claim for breach of contract fails because McIlwain never performed its obligations under the agreement.

⁷ Both parties agree that all three claims in the complaint are governed by California law.

As discussed below, the Court concludes that the fee-splitting agreement is unenforceable because it violates New Jersey RPC 1.5(e) and therefore violates public policy. Thus, the Court will grant Hagens Berman's summary judgment motion as to McIlwain's claim for breach of contract.

"Under general principles of California contract law, a contract is unlawful, and therefore unenforceable, if it is '[c]ontrary to an express provision of law' or '[c]ontrary to the policy of express law, though not expressly prohibited.'"

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 6 Cal. 5th 59, 73 (2018) (quoting Cal. Civ. Code § 1667) (alterations in the original). "California courts have held that a contract or transaction involving attorneys may be declared unenforceable for violation of the Rules of Professional Conduct[.]" Id. Whether a contract is unenforceable based on these principles is a question of law. See McIntosh v. Mills, 121 Cal. App. 4th 333, 343 (2004).

Here, Hagens Berman argues that the fee-splitting agreement is unenforceable because it violates New Jersey RPC 1.5(e); this rule provides:

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is notified of the fee division; and

(3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

N.J. RPC 1.5(e).

California contract law precludes a court from enforcing an agreement to divide attorneys' fees between lawyers of different law firms if the agreement violates the California Rules of Professional Conduct (RPC), because any such agreement would violate public policy. In Chambers v. Kay, 29 Cal. 4th 142, 161 (2002), the Supreme Court of California held that an agreement to divide attorneys' fees was unenforceable on the ground that the arrangement was undertaken without written client consent in violation of California RPC 2-200.⁸ The court reasoned that the California RPC had been adopted with its approval in order to "protect the public and to promote respect and confidence in the legal profession." Id. at 158. In light of the public-policy purpose underlying the California RPC, the Supreme Court of California concluded that it would be "absurd" for a court to aid an attorney in enforcing a contract that violated the RPC. Id. at 161 ("[I]t would be absurd for this or any other court to aid Chambers in accomplishing a fee division that would violate the

⁸ California RPC 2-200 provides, in relevant part:

A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

1 rule's explicit requirement of written client consent and would
2 subject Chambers to professional discipline.").

3 Likewise, under New Jersey contract law, an agreement among
4 lawyers that violates the New Jersey RPC violates public policy and
5 is therefore unenforceable. Jacob v. Norris, McLaughlin & Marcus,
6 128 N.J. 10, 17 (1992) (noting that the New Jersey RPCs "establish
7 the state's public policies with respect to attorney conduct" and
8 holding that "[c]ontracts that violate the RPCs violate public
9 policy, and courts must deem them unenforceable"). The Supreme
10 Court of New Jersey adopted the New Jersey RPC for the same purpose
11 that the Supreme Court of California adopted the California RPC,
12 namely to regulate the practice of law and protect the public
13 interest. See id. In light of the public-interest purpose of the
14 New Jersey RPC, it follows that an agreement among lawyers that
15 violates the New Jersey RPC would violate public policy and would
16 therefore be unenforceable under California, as well as New Jersey,
17 contract law. Cf. Chambers, 29 Cal. 4th at 126.

18 Here, Hagens Berman has met its burden as the moving party by
19 pointing to the absence of evidence showing that the fee-splitting
20 agreement at issue satisfied the requirements of New Jersey RPC
21 1.5(e). As noted above, the record shows, and McIlwain does not
22 dispute, that Timothy McIlwain was licensed at all relevant times
23 to practice law in New Jersey and that McIlwain is a New Jersey law
24 firm; accordingly, the fee-splitting agreement at issue is subject
25 to the New Jersey RPC. New Jersey RPC 1.5(e) requires, among other
26 things, that the client be "notified of the fee division" and that
27 the client consent "to the participation of all lawyers involved."
28 N.J. RPC 1.5(e). There is no evidence showing that McIlwain

1 notified Ryan Hart of its fee-splitting agreement with Hagens
2 Berman, or that Ryan Hart consented to the participation of Hagens
3 Berman as McIlwain's co-counsel. The absence of this evidence
4 supports the conclusion that the fee-splitting agreement did not
5 comply with New Jersey RPC 1.5(e) and therefore is unenforceable.

6 In its opposition, McIlwain fails to show that a genuine
7 dispute exists as to whether the fee-splitting agreement complied
8 with New Jersey RPC 1.5(e). First, McIlwain appears to argue that
9 the fee-splitting agreement was subject to the California RPC
10 (specifically, California RPC 2-200) instead of the New Jersey RPC.
11 See Opp'n at 12-13, Docket No. 133. McIlwain, however, cites no
12 authority or facts to establish that its obligations as counsel to
13 Ryan Hart were governed by the California RPC instead of the New
14 Jersey RPC. Accordingly, McIlwain's reliance on the California
15 RPC, and California RPC 2-200 in particular, is misplaced.⁹

16 Second, McIlwain argues that Ryan Hart consented to the fee-
17 splitting agreement because Ryan Hart "ratified" it during his

18 ⁹ Even if the fee-splitting agreement were subject to
19 California RPC 2-200, the agreement would still be unenforceable
20 because there is no evidence that McIlwain complied with that rule
21 in connection with the agreement. RPC 2-200 requires, among other
22 things, that the client consent to a fee-division among attorneys
23 of different firms "in writing . . . after a full disclosure has
24 been made in writing that a division of fees will be made and the
25 terms of such division." See Cal. RPC 2-200. Here, McIlwain has
26 pointed to no writing showing that it disclosed to Ryan Hart either
27 that it would divide its fees with Hagens Berman, or the terms of
28 any such division. The absence of evidence that McIlwain made
these written disclosures is sufficient to conclude that the fee-
splitting agreement at issue violates California RPC 2-200 and is
unenforceable under Chambers, 29 Cal. 4th at 126. McIlwain's
reliance on Mink v. Maccabee, 121 Cal. App. 4th 835 (2004), for the
proposition that client consent under California RPC 2-200 need not
be obtained until the fees in question are divided is unavailing,
because here, as noted, McIlwain's breach-of-contract claim is
defeated by the lack of evidence that McIlwain made the written
disclosures required by RPC 2-200 at any time.

1 deposition for this litigation, which took place in August 2019,
 2 and because Ryan Hart signed a document titled "Duties of Class
 3 Representatives," which was attached to another document that Ryan
 4 Hart did not sign titled "Class Representative/Attorney
 5 Representation Agreement." See Opp'n at 12-13, 4. Even when
 6 viewing this evidence in the light most favorable to McIlwain, it
 7 does not give rise to a genuine dispute as to whether McIlwain
 8 complied with New Jersey RPC 1.5(e).

9 The portions of Ryan Hart's deposition that McIlwain cites
 10 show that Ryan Hart testified that he agreed to McIlwain
 11 "bring[ing] in other law firms" (without further specification as
 12 to which law firms) and that he was "okay" with McIlwain "shar[ing]
 13 fees with another attorney" as stated in the unsigned "Class
 14 Representative/Attorney Representation Agreement." See Ryan Hart
 15 Dep. Tr. at 70-71. The testimony of Ryan Hart and the unsigned
 16 document just described do not suggest compliance with New Jersey
 17 RPC 1.5(e), because neither shows that McIlwain notified Ryan Hart
 18 of the specific fee apportionment with Hagens Berman, or of Hagens
 19 Berman's participation as co-counsel to McIlwain.¹⁰ See In
 20 Whitehead v. Stull, Stull & Brody, No. CV 17-4704 (SRC), 2019 WL
 21 1055756, at *8 (D.N.J. Mar. 5, 2019) (holding that New Jersey Rule

22
 23 ¹⁰ Notably, as discussed above, McIlwain disclosed to Ryan
 24 Hart, in writing (via a letter dated September 4, 2013), its fee-
 25 splitting agreement with the Lanier Law Firm, including the terms
 26 of the agreed-upon fee division, and it requested Ryan Hart's
 27 consent to that fee-splitting agreement and the addition of the
 28 Lanier Law Firm as co-counsel. Timothy McIlwain Decl., Ex. 21,
 Docket No. 134-1 at 112-14. In that letter, McIlwain stated that
 he was seeking Ryan Hart's written consent because the "the rules
 of professional conduct require" it. Id. McIlwain points to no
 similar writing with respect to its fee-splitting agreement with
 Hagens Berman.

1 1.5(e) requires disclosure to the client of "the parameters of the
2 fee arrangement" in question, including "the proceeds among
3 counsel" and the "division of labor or responsibilities among co-
4 counsel," and that a failure to disclose these matters to the
5 client renders the fee-division agreement unenforceable for
6 "fail[ure] to satisfy the requirements of RPC 1.5(e)".

7 Because there is no genuine dispute that the fee-splitting
8 agreement at issue violated New Jersey Rule 1.5(e), the Court
9 concludes that the agreement violates public policy and is
10 therefore unenforceable. Accordingly, McIlwain's claim for breach
11 of contract fails as a matter of law. In light of this conclusion,
12 the Court need not reach Hagens Berman's alternative arguments as
13 to this claim.

14 II. Breach of the implied covenant of good faith and fair dealing

15 The second claim in the complaint is for breach of the implied
16 covenant of good faith and fair dealing. Compl. ¶¶ 22-26 at 8-9.
17 This claim is predicated on Hagens Berman's alleged breach of the
18 fee-splitting agreement. Id.

19 "The implied promise [of good faith and fair dealing] requires
20 each contracting party to refrain from doing anything to injure the
21 right of the other to receive the benefits of the agreement." Egan
22 v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818 (1979). "In
23 essence, the covenant is implied as a supplement to the express
24 contractual covenants, to prevent a contracting party from engaging
25 in conduct which (while not technically transgressing the express
26 covenants) frustrates the other party's rights to the benefits of
27 the contract." Love v. Fire Ins. Exchange, 221 Cal. App. 3d 1136,
28 1153 (1990). "The implied covenant of good faith and fair dealing

1 does not impose substantive terms and conditions beyond those to
2 which the parties actually agreed." Avidity Partners, LLC v. State
3 of California, 221 Cal. App. 4th 1180, 1204 (2013) (citation
4 omitted). Thus, "[t]he implied covenant of good faith and fair
5 dealing rests upon the existence of some specific contractual
6 obligation." Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683-
7 684 (1988).

8 Hagens Berman moves for summary judgment on McIlwain's claim
9 for breach of the implied covenant of good faith and fair dealing
10 on the ground that the claim fails because it depends on the fee-
11 splitting agreement, which is unenforceable.

12 In its opposition, McIlwain does not squarely address, or cite
13 any authority that contradicts, Hagens Berman's argument that this
14 claim fails to the extent that the fee-splitting agreement is
15 unenforceable. See Opp'n at 18-19.

16 A claim for breach of the implied covenant of good faith and
17 fair dealing cannot exist without an enforceable contract. See
18 Foley, 47 Cal. 3d at 683-684 (holding that the implied covenant "is
19 a contract term" and "rests upon the existence of some specific
20 contractual obligation"). Because McIlwain's claim for breach of
21 the implied covenant of good faith and fair dealing was predicated
22 on the fee-splitting agreement, which this Court has concluded is
23 unenforceable, the claim fails as a matter of law. Accordingly,
24 the Court will grant Hagens Berman's motion for summary judgment as
25 to this claim.

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1 III. Intentional interference with prospective economic advantage

2 The third claim in the complaint is for intentional
3 interference with prospective economic advantage (IIPEA). Compl.
4 ¶¶ 27-32 at 1-10. This claim is predicated on allegations that
5 Hagens Berman interfered with McIlwain's expected economic
6 advantage from the fee-splitting agreement by refusing to split
7 with McIlwain the attorneys' fees that it received after the Court
8 approved the settlement with EA. Id.

9 An IIPEA claim requires "(1) an economic relationship between
10 the plaintiff and some third party, with the probability of future
11 economic benefit to the plaintiff; (2) the defendant's knowledge of
12 the relationship; (3) intentional acts on the part of the defendant
13 designed to disrupt the relationship; (4) actual disruption of the
14 relationship; and (5) economic harm to the plaintiff proximately
15 caused by the acts of the defendant." Marsh v. Anesthesia Serv.
16 Med. Group. Inc., 200 Cal. App. 4th 480, 504 (2011). "California
17 recognizes a cause of action against noncontracting parties who
18 interfere with the performance of a contract." Applied Equip.
19 Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 513 (1994).
20 "However, consistent with its underlying policy of protecting the
21 expectations of contracting parties against frustration by
22 outsiders who have no legitimate social or economic interest in the
23 contractual relationship, the tort cause of action for interference
24 with contract does not lie against a party to the contract." Id.
25 (citations omitted).

26 Hagens Berman moves for summary judgment on McIlwain's IIPEA
27 claim on the ground that the claim, which is predicated on Hagens
28 Berman's alleged interference with the fee-splitting agreement to

1 which it is a party, fails as a matter of law because an IIEPA
2 claim can be asserted only against a person or entity that is not a
3 party to the contract at issue.

4 In its opposition, McIlwain appears to concede that its IIEPA
5 claim against Hagens Berman fails as a matter of law. See Opp'n at
6 3 (stating that its IIEPA claim "became moot with the dismissal of
7 the individual partners from the case").

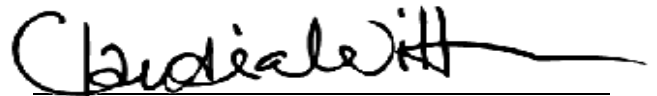
8 Because McIlwain's IIEPA claim against Hagens Berman is
9 premised on alleged interference with the fee-splitting agreement,
10 and it is undisputed that Hagens Berman is a party to that
11 agreement, the claim fails as a matter of law. See Applied Equip.,
12 7 Cal. 4th at 513 (holding that "the tort cause of action for
13 interference with contract does not lie against a party to the
14 contract").

15 CONCLUSION

16 For the reasons set forth above, the Court GRANTS Hagens
17 Berman's motion for summary judgment with respect to all three
18 claims in the complaint. The Clerk shall enter judgment against
19 Plaintiff McIlwain and in favor of Defendants. Defendants shall
20 recover their costs. The Clerk shall terminate the action.

21 IT IS SO ORDERED.

22 Dated: February 10, 2020



23 CLAUDIA WILKEN
24 United States District Judge
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